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ADMISSIBILITY, IN A CRIMINAL TRIAL, OF THE FORMER TESTIMONY OF A WITNESS, SINCE DEAD.

The readers of the LAW REGISTER have had this question brought to their attention both in an editorial and an able, interesting article in the August and November numbers.

The discussion arose from its application to the third trial of John Richards, for murder in the county of Floyd, which at the October term resulted in a judgment of capital conviction. The learned judge admitted the evidence of the deceased witnesses and the question will not come before the Supreme Court for review. As the sad circumstances attending this case may be repeated in other parts of the Commonwealth, this important question deserves the most careful consideration.

Some of the Circuit Judges in the State may differ from the learned judge of the Twentieth Circuit either as to his conclusion upon the abstract proposition of law, or as to the binding effect of the former utterances of the Court of Appeals, and by excluding such evidence thus pass the question up to that high court, for its final and absolute determination. Hence the justification for its further discussion.

It is our pride that the rights of an individual stand higher before the law and are more jealously watched and guarded by its ministers of justice than are the rights of property. This has not always been true in our jurisprudence, and, however, great the progress that has been made towards this consummation, so devoutly to be wished, there has been no milestone, marking this progress, so conspicuous or so encouraging, as that which left behind and marked the decadence of those rules prohibiting to the defendant an opportunity to face his accusers; to be advised of the charges against him and to be heard by counsel in his own defense. But when we find upon the statute books of a neighboring state[1] an enactment which permits a charge of mur-

1. Code West Virginia, Ch. 144, § 1.

der to be framed in five lines of writing, and compare this with the increasing nicety required of the pleader in a civil action, demanding that he give his opponent a full and fair disclosure of the facts from which the legal liability is to be inferred, and when we hear one of the most learned of the jurists of our day,[2] advocating with all seriousness and with much applause, the abolition of appeal in criminal cases, it is not a waste of time to be cautious lest a step backward should be taken, in our progress toward the protection of life and liberty.

It is beyond all question proper to admit on a second trial of a civil action, the former testimony of a witness since dead, and that it should ever have been seriously contended that a person in the protection of his life should be denied the benefit of evidence which he could adduce in an action of detinue, is astonishing. Yet but recently it was accepted by a large portion of the bar and the judiciary of Virginia, that such was the case. The explanation is that we find an unofficial report of a recent case,[3] and without dissent, holding that such testimony is inadmissible. It is fortunate indeed that the learned and careful judge who wrote that opinion gave further thought to his utterances, and eliminated the same from the official report.

An investigation of the question, 1st, upon reason and from analogy, and 2nd, upon authority, can not be altogether without interest or advantage.

It is said that in the absence of constitutional or statutory mandate the rules of evidence are the same in criminal and civil cases since they are but the means of judicially ascertaining facts in issue, and are alike in each case "founded upon the charities of religion—in the philosophy of nature in the truths of history—and in the experiences of common life," for, as Lord Erskine says,[4] "a fact must be established by the same evidence whether it be followed by a criminal or civil consequence. But it is a totally different question * * * how the noble person now on trial may be affected by the fact when so established."

The rules governing the testimony of witnesses are neither numerous nor complicated, that under inquiry being the principal

2. Mr. Justice Brewer.
3. Montgomery's Case, 37 S. E. 841.
4. Lord Melvilles Trial, 29 How. St. Tr. 746.

one of its class, to wit, that hearsay evidence is not admissible. The reason of the rule being its life, we find this in the danger which attends the presentation as evidence of statements made neither under the sanction of an oath nor the ordeal of cross-examination, and hence the requirement that the person from whose lips the evidentiary facts are taken must speak them under oath and in the presence (not of the jury or the tribunal, under the common-law rule), of the party against whose contention those statements are directed, to the end that they may be also subjected to the test of cross-examination—spoken in the open, not in the dark—to the face and not behind the back.

When A is put upon the stand to testify that B has made a certain statement of facts, it is not A's knowledge of these facts that is being communicated to the tribunal, but it is B's knowledge transmitted through the double medium of B's statement and A's memory, and as was said by Chief Justice Appleton[5] "the individual testifying is merely the pipe or conduit through whose agency the impressions of some one else are conveyed to the court, and the objection to this form of testimony is that the expressions of the mind which knew the fact have not been made with the impress of an oath upon that mind and that the collateral and attendant facts also present in that mind have not been brought out by cross-examination." So by Lord Blackburn[6]: "In England hearsay evidence, that is to say, the evidence of a man who is not present in court and who therefore cannot be cross-examined, as a general rule is not admissible at all." And by Kent, Chief Justice,[7] "a person who relates a hearsay is not obliged to enter into any particular, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author. The plaintiff by means of this species of evidence would be taken by surprise and be precluded from the benefit of cross-examination as to all those material points which have been suggested as necessary to throw full light on his information." In other words

5. Evidence, p. 174.
6. Dysart Peerage Case, L. R., 6 App. Cas. 503.
7. Coleman *v.* Southwick, 9 John 50.

it is after all the principal objection that a *part* and not the *whole* of the knowledge of the absent witness is disclosed, and even that without oath.

By this want of opportunity to cross-examine and the absence of the oath, the party against whom the former statements are offered, is deprived both of the probe of his own cross-examination and of the witness' conscience; those two essential instruments of protection in the judicial ascertainment of fact from human statement.

The most noticeable and indisputable exception to the hearsay rule is the proof of the dying declaration which may be offered against a defendant. Here he is deprived of both of the above-mentioned instruments of protection. It is often said that such statements are admitted as a matter of necessity. If necessity were the only test it would certainly be applicable to the testimony of a witness since dead, whether the statement was made in contemplation of death or under other conditions.

Once admitting the competency of a witness if alive, the *necessity* of reproducing his testimony is not altered by the manner or the time of his death; rather is it determined by the *value* of that testimony. The real ground of the admissibility of the dying declaration is that the law considers that the party has been otherwise supplied with instruments of protection, similar to the oath and the cross-examination. The dying witness is subjected to the searching influence of his own conscience and the impending presence of the greatest of all Cross-Examiners, and, as was said by Judge Christian,[8] he is "induced by the most powerful consideration to tell the truth, a situation so solemn and awful is considered by the law as creating the most impressive of sanctions."

So that in both cases the points to be established are two: 1st, the *fact* of the former statement of a witness now dead, 2nd, such circumstances surrounding that statement as will in contemplation of law afford suitable protection to the party against whom it is directed. In each instance we have that protection which the law considers essential and sufficient, the conscience and the search light. Therefore the rule so well established by authority and so well vindicated by experience,

8. Swisher *v.* Commonwealth, 26 G. 963.

that where a witness has once been under oath and cross-examination, his testimony may be produced at second hand, whether by the notes of the judge or by memory of persons in attendance, or by the cotemporaneous verbatim memoranda of an officer as taking a deposition. In each instance it is the *fact* of the statement that is offered, and from that fact as proven with all its paraphernalia of oath and cross-examination, or fear of death, the triers of the fact must determine its probative value.

If the rule is so well settled in civil cases, why the distinction in a criminal case? We are speaking in the absence of any constitutional or statutory mandate. If the necessity is sufficient to permit a defendant in an action of ejectment or detinue, to protect his title to property real or personal by the secondary proof of a witness' knowledge, under how much greater necessity does the man labor whose defense of life or liberty is to be established only from the knowledge of a dead witness. If the necessity is sufficient to justify his accusation by statements from lips that are silent, how much greater the necessity for an ample opportunity of vindication, when the only lips that could speak that vindication are also silent. If, then, it is a question of probative value under the sanction of oath or the probe of cross-examination, that value is as well established in a criminal as in a civil case, and if a question of necessity, the necessity is more far reaching.

Whatever may be the constitutional or statutory mandate, that the accused shall be confronted by his adversaries and accusers, there is certainly no such provision which the commonwealth may invoke, against the preservation to the prisoner of his defense, for, however such mandates may alter the procedure and effect of evidence offered on behalf of the State, yet in all instances the defendant has a right to establish his innocence according to the well-settled rules of evidence, which, if they were not available to him, could hardly be said to be "founded upon the charities of religion, the philosophy of nature or the experiences of common life." Even such mandates are not sufficient to deny the State the invocation of the doctrine of necessity or ample protection which permits the dying declaration. If the State against whom these mandates are directed, can invoke that doctrine, surely it should not be denied the defendant for whose protection they are enacted.

The authorities upon the question of the admissibility of such evidence are certainly overwhelming in its favor. In the 14th volume of the Century Digest, column 1931, § 123,[9] we find the following note: "The testimony of a witness given on the preliminary examination of the defendant is competent on the trial, the witness having died in the meantime."

Also at same section: "Evidence of a witness on a former trial of a criminal case is admissible in a second trial on proof of the death of such witness."

Mr. Greenleaf lays down the general proposition without exception and cites in support of his position numerous criminal cases. The same proposition is laid down in the "Cyc." (12, p. 544) with the exception that at common law such testimony was not available to the prosecution.

The case of Maddox *v.* United States, 156 U. S. 237, holding that such testimony is admissible for prosecution or defense, was reviewed in the article on this subject in the November number, and in none of the text books examined have we noted any exception to the universality of this rule.

This array of authorities is met by the dicta in Finn's Case,[10] by an approval of that dicta in Brogy's Case,[11] (in each of which the witness was still living) and by a disclaimer in Crite's Case[12] of any intention to pass upon the subject or of any opinion thereon, and finally the concluding language of the court in Montgomery's Case[13] as unofficially reported, omitted from the official reports. After citing Judge Allen in Brogy's Case, Judge Phlegar says:

"Since the opinion of Judge Allen in the Brogy case, the criminal laws have thrice been revised and as the Legislature has not seen fit to disturb the law we feel bound by the decision." The able, learned, and careful judge was quick to recognize upon further thought the doubtful character of his authority and omitted this part of his opinion in its official publication.

We come then to the question of the value of the authority of

9. Citing 43 Cases from 19 States.
10. 5 Rand. 701.
11. 10 Gratt. 733.
12. 1 Va. Dec. 426.
13. 37 S. E. 841.

Brogy's Case, and the effect of the failure of the Legislature to establish a rule at variance with a mere dicta. The doctrine of legislative acquiescence in judicial utterances must be predicated upon the proposition that the legislature, having considered the utterances, have seen fit to leave its binding effect upon the courts unimpaired by legislation.

Legislative repudiation is but to relieve the courts of the existing obligation. If the dicta is not binding upon the courts there is no occasion for the relief and no inference from its absence. Since a mere dicta is but the personal utterances of the individual judge, not the judicial utterance of the court, it can have no binding effect upon subsequent adjudication, and hence there is no virtue to be found in the absence of legislative repudiation.

Chief Justice Marshall says:[14]

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

Be that as it may, rules of evidence, its relevancy, admissibility and probative value are essentially of judicial creation and development. They are rarely the subject of legislative enactment. If all legislation upon the question of pleading subsequent to Sherman *v.* Baltimore, etc., R. Co.[15] were not binding upon the court, but were repudiated in the Hortonstine Case,[16] and if a rule so well established as that which required an instruction predicated upon a scintilla of evidence, and which had received fifty years of negative legislative acquiescence can be departed from by the court,[17] the wisdom or salutary effect of which departures are not to be questioned, surely they may depart from a mere dicta, which is at variance with reason and the authority of almost all other courts and the text writers.

But the question remains as to how far the nisi prius court is justified in making such a departure in advance of the appellate

14. Cohen *v.* Virginia, 6 Wheat, 399.
15. 30 Gratt. 602.
16. 102 Va. 914.
17. Stock *v.* C. & O., 104 Va. 97.

court. The learned judge who tried the Richard's Case had all of these questions fairly and squarely presented to him and it is difficult to see how his conclusions can be successfully assailed. Surely he was left free to weigh the reason and authority, and to arrive at and establish the safe, just and humane rule. But had the Supreme Court of Virginia been less uncertain in its utterances, a nice question is presented as to the duty of the trial court. It was held in Virginia for many years, and it is still held in West Virginia, that the jury in a criminal case are the judges of both the law and fact, by reason of their authority and ability, or you might say power, to find a verdict of not guilty. In questions concerning the constitutionality of a state statute the decision of a state court, that such statute was not in violation of the Federal Constitution, is final, although a contrary opinion may have been rendered by the Supreme Court of the United States upon an identical statute in another proceeding; yet we are told by no less authority than Professor Lile[18] that such a ruling is not binding upon the state court, because there is no opportunity for review of such a judgment. Why, then, is not the decision of the trial court in a criminal case, which is not the subject of review, unhampered by a contrary decision of the Supreme Court. The question as an abstract proposition is not without interest, but it is not thought that the judge of the Twentieth Circuit was actuated by any such consideration. He saw the array of authority and of reason in support of the admissibility of this evidence, he saw nothing to the contrary but a dicta once followed by a dicta and this by an express disclaimer, he saw that natural justice required that the defendant, by the death of his witnesses, should not be deprived of his defense, and it is believed he adopted a course which will now meet with the approval of the bar, will find concurrence from other Circuit Judges, and if the question is ever presented to the Court of Appeals, will be confirmed by that high tribunal.

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18. 7 Va. L. R., 277 Editorial.